Date: December 5, 1996

Case No.: 95-INA-150

In the Matter of:

MR. AND MRS. MARC COHEN,
Employer

On Behalf Of:

BEVERLY ELMORE BROWN,
Alien

Appearance: Franklin S. Abrams, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On September 24, 1993, Mr. and Mrs. Marc Cohen ("Employer") filed an application for labor certification to enable Beverly Elmore Mattis Brown ("Alien") to fill the position of Cook, Domestic, Live-in or Live-out (AF 11-12). The job duties for the position are:

> Will cook lunch and dinner for family according to taste of employer. Prepare vegetables and meats for cooking. Bake breads and pastries. Prepare fancy dishes and pastries for social gatherings. Purchase all foodstuffs. Clean kitchen and all kitchen equipment.

The requirements for the position are two years of experience in the job offered or two years of experience as a houseworker, including cooking. Other Special Requirements are:

> *Tuesday through Saturday (if live-out). Extra day will be Sunday from 10:30 a.m. to 2:30 p.m. (If live-in). Must be willing to vary hours when necessary for parties. **$343. Per week plus free room and board if live-in; $475. Per week plus carfare if live-out.

The CO issued a Notice of Findings on May 10, 1994 (AF 42-45), proposing to deny certification on the grounds that: (1) the requirement that the worker live on the premises is not normally required for this position and is unduly restrictive unless supported by evidence of business necessary in violation of § 656.21(b)(2)(i); (2) the position offered is not full-time employment in violation of § 656.50; and, (3) the related experience requirement of two years as a Houseworker, General, exceeds the SVP requirement and is excessive and restrictive in violation of § 656(b)(2).

Accordingly, the Employer was notified that it had until June 14, 1994, to rebut the findings or to cure the defects noted. On June 13, 1994, the Employer requested an extension of time to submit rebuttal until June 30, 1994, which request was granted on June 14, 1994 (AF 46, 47).

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

In its rebuttal, dated June 23, 1994 (AF 53-56), the Employer contended that: (1) since the option of being a live-in or a live-out worker is offered, a showing of business necessity should not be required; (2) the working hours of 10:30 a.m. to 7:30 p.m. are normal for this occupation; (3) the offered position is a full-time position; and, (4) the Employer is willing to amend the experience requirement to be two years as a domestic cook, with no alternate experience requirement.

The CO issued a second Notice of Findings on July 7, 1994 (AF 57-60). The CO accepted the Employer's rebuttal to the first NOF on the issue of the full-time nature of the job duties under § 656.50, and the need to demonstrate business necessity in accordance with § 656.21(b)(2)(i). The CO then stated that the Employer's rebuttal has caused two new issues to arise which must be addressed by the Employer.

First, the CO found that the Employer had amended Item 14, ETA Form 750A, to delete the related occupation of "Houseworker, General with cooking duties." Then, the CO found that since the Alien had no experience in the job opportunity (Domestic Cook), it appears that the Employer hired the Alien for the offered position without the required experience. The CO noted, but rejected, the Employer's apparent argument that the Alien met the experience requirement by working 12 years in domestic work, of which one-quarter of the time (or three years) was spent working as a domestic cook (AF 59). Therefore, the CO found that the Employer must fully document why it is not feasible for him to accept a U.S. worker without this same experience, or he may submit evidence showing that the Alien had the required qualifications at the time of hire, or he may reduce his requirements to that which the Alien had at the time of hire, in accordance with § 656.21(b)(5).

Second, the CO found that the Employer had not documented one full year of paid experience in the job opportunity in violation of § 656.21(a). (See § 656.21(a)(3)(iii)). Therefore, the CO directed that the Employer must provide documentation of the Alien's paid experience in the form of statements from past or present employers setting forth the dates employment started and ended, places where the Alien worked, a detailed statement of the duties performed on the job, and the wages paid for such duties; the Alien's documentation must show at least one year of experience in the tasks to be performed on the job, and the wages paid for such duties.

Accordingly, the Employer was notified that it had until August 11, 1994, to rebut the findings or to cure the defects noted. On August 8, 1994, the Employer requested an extension of time to submit rebuttal until August 31, 1994, which request was granted on August 9, 1994 (AF 61, 62).

The Employer submitted its rebuttal to the second NOF on August 16, 1994 (AF 63-67). Counsel for Employer argued that the Alien's experience was in the <u>duties</u> of the occupation of Cook, Domestic, as opposed to the job title. In support he attached a letter from a previous employer of the Alien, who indicated that the Alien did perform the duties of a Cook, Domestic, during her employment, and that it equaled more than 1½ years of full-time work. Additionally, Counsel argued that the Alien alleges similar work for a different employer on her Form 750B,

with total time exceeding the equivalent of two years of full-time work. Therefore, Counsel argued that the Alien had the required two years of experience in the job opportunity.

The CO issued the Final Determination[2] on September 2, 1994 (AF 68-70), denying certification because the Employer has failed to show that the Alien has the required two years of full-time experience in the job duties of Household Cook. The CO further stated:

> It would appear rather, based on employer's failure to comply with 20 CFR 656.21(b)(5), that a[n] effort is being made to qualify the alien under the 'Skilled Worker' category because of the unavailability of visa numbers in the 'Other Worker' category of employment based preferences.

On September 16, 1994, the Employer requested review of the Denial of Labor Certification (AF 71-77). On November 25, 1994, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). The Employer filed a Brief on January 18, 1995.

Discussion

Section 656.21(b)(5) provides:

> *The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.*

Section 656.21(b)(5) addresses the situation of an employer requiring more stringent qualifications of a U.S. worker than it requires of the alien. Thus, the employer is not allowed to treat the alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a Bayside Motor Inn*, 89-INA-105 (Feb. 14, 1990). Furthermore, an employer must establish that the alien possesses the stated minimum requirements for the position that is being offered. *Charley Brown's*, 90-INA-345 (Sept. 17, 1991); *Pennsylvania Home Health Services*, 87-INA-696 (Apr. 7, 1988).

We have held that the alien's experience in the job duties may be used as proof of his or her qualifications for the job. For example, one employer was able to demonstrate that the alien met the minimum job requirement of five years of experience in the job offered by showing that he had five years of experience in the listed duties. *Advanced Business Communications, Inc.*, 99-INA-36 (June 30, 1989). See also, *Applied Magnetics Corp.*, 90-INA-105 (Sept. 9, 1991); *William Lawrence Camps, Inc.*, 90-INA-248 (June 24, 1991). Furthermore, the requirement of

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[2] The CO did not mention the issue of compliance with § 656.21(a)(3)(iii), even though the Employer failed to respond to that issue in the second rebuttal. It is well settled that the Board will not consider issues not preserved by the CO in the FD. See *Loew's Anatole Hotel*, 89-INA-230 (Apr. 26, 1991) (*en banc*); *Drs. Preisig & Alpern*, 90-INA-35 (Oct. 17, 1990).

"experience in the job offered" includes experience in the job duties as described in Item 13 of the ETA 750A, and not just experience in the job title. *National Institute for Petroleum and Energy Research,* 88-INA-535 (Mar. 17, 1989) (*en banc)*; *Integrated Software Systems, Inc.,* 88-INA-200 (July 6, 1988) (referring to the qualifications of a U.S. applicant). Citing to *Integrated Software Systems, Inc., supra,* the panel specified that "with respect to the employer's requirement of one year experience in the job itself, what is required to satisfy this qualification is experience in actually performing the duties of the job, not merely in having its title." *The Pacific Club,* 93-INA-25 (Jan. 24, 1994).

Therefore, we agree with the Employer that the Alien can use her experience in the job duties as proof of her qualifications for the job, regardless of the job title. However, an employer must establish that the alien possesses the stated minimum requirements for the position. *Charley Brown's, supra; Pennsylvania Home Health Services, supra.*

In this case, the Employer requires "two years experience in the job or two years (4,080 hours) of cooking experience wherever and however gained." The Employer has provided supporting documentation that the Alien has experience in the duties of a Cook, Domestic. However, this documentation only shows 1½ years of the required experience. The Employer relies on the Alien's undocumented assertions to provide evidence of the remaining required experience. However, an alien's assertion, without documentation, does not demonstrate that he or she satisfies the employer's actual minimum requirements. *MITCO,* 90-INA-295 (Sept. 11, 1991); *Siam Hotel, Inc.,* 87-INA-537 (Nov. 24, 1987). Likewise, an employer's unsupported statement that the alien meets its minimum requirements does not constitute adequate documentation that the alien meets those requirements. *Wings Wildlife Production, Inc.,* 90-INA-69 (Apr. 23, 1991); *University of Arizona,* 88-INA-368 (July 17, 1989).

Therefore, we find that the Employer has not fulfilled its duty to provide evidence that the Alien has the two years of experience needed to fill the position. Under § 656.21(b)(5), where an alien does not meet the employer's stated job requirements, certification is properly denied. Accordingly, we affirm the CO's decision to deny the labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of December, 1996, at Cincinnati, Ohio.

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party

petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.